Marijuana for Medical Purposes: The Supreme Court's Decision in *United States v. Oakland Cannabis Buyers' Cooperative* and Related Legal Issues

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Summary

In *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001), the United States Supreme Court held, without dissent, that there is no medical necessity defense to the federal law prohibiting cultivation and distribution of marijuana—even in states which have created a medical marijuana exception to a comparable ban under state law.

Congress classified marijuana as a Schedule I controlled substance, a classification it reserved for those substances which have no currently accepted medical use in the United States. Therefore, the Court concluded, Congress could hardly have intended to recognize a medical necessity defense for marijuana and recognition of any such defense would be contrary to Congress' clear intentions.

The Coop raised three constitutional issues in its brief before the Court. It suggested that a federal medical marijuana ban would exceed the reach of Congress' authority to regulate interstate commerce; that such a ban would be contrary to the constitutional reservation of powers to the people; and that such a ban would be contrary to the substantive due process rights of patients who use marijuana for medical reasons. The Court did not address the constitutional issues suggested in the Coop's brief because the lower court decision under review did not rule upon them. Other courts have disagreed over whether enforcement of the ban against physicians is contrary to their First Amendment right to free speech.

The Court's description of matters within Congress' legislative authority under the commerce clause in *United States v. Lopez* and *United States v. Morrison* indicates that the federal ban on the cultivation, distribution or possession of marijuana lies within Congress' prerogatives. The Court confirmed that Congress' commerce power permits it to ban in-state cultivation and possession of marijuana for medical purposes in *Gonzales v. Raich*. Its characterization of the limitations on the enacting clause in *Printz v. United States* and of the circumstances warranting expanded substantive due process recognition in *Washington v. Glucksberg* encumber the Coop's contentions on those counts.

Related legislative activity in this Congress includes a proposal for an exception to the federal prohibitions in those states whose laws allow use of marijuana for medicinal purposes (H.R. 2087).

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Introduction

There is no medical necessity defense to the federal crimes of cultivating or distributing marijuana. So said the Supreme Court in *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 486 (2001). The Court left undecided questions over whether a necessity defense might be available for possession and over possible enactment clause, and due process clause challenges. In *Gonzales v. Raich*, 125 S.Ct. 2195 (2005), it rejected the suggestion that purely local cultivation or possession of marijuana for medical purposes rested beyond Congress's reach under the commerce clause.

Background

The federal Controlled Substances Act (CSA) outlaws the cultivation, distribution, or possession of marijuana, 21 U.S.C. 841, 844.[1] The ban is a component of federal and state schemes which regulate the sale and possession of drugs and other controlled substances. The State of California has created a medical necessity exception to its marijuana prohibitions, CAL.HEALTH & SAFETY CODE ANN. §11362.5.[2] The Oakland Cannabis Buyers Cooperative (the Coop) was one of the entities which dispensed marijuana to patients qualified to receive it under state law.

Federal authorities sued to enjoin cultivation and distribution of marijuana in violation of federal law by the Coop and its suppliers. The federal district court granted a preliminary injunction, *United States v. Cannabis Cultivators Club*, 5 F.Supp. 2d 1086 (N.D.Cal. 1998), which the Court of Appeals overturned for failure to consider an implicit medical necessity defense, *United States v. Oakland Cannabis Buyers Cooperative*, 190 F.3d 1109 (9th Cir. 1999).

The necessity or "choice of evils" defense has been recognized by a number of other lower federal appellate courts.[3] The Supreme Court seemed to verify its vitality, at least indirectly, when it described the prerequisites for the defense to an escape charge: "where a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon

[1] Strictly speaking, sections 841 and 844 proscribe the unlawful manufacture, distribution, dispensing, or possession of controlled substances. Marijuana is classified as a Schedule I controlled substance, 21 U.S.C. 812(c), Sch.I(c)(10). "Manufacturing" means "production, preparation, propagation, compounding or processing," 21 U.S.C. 802(15), and "production" includes "planting, cultivation, growing, or harvesting of a controlled substance," 21 U.S.C. 802(22). Schedule I is reserved for those controlled substances which (A) have "a high potential for abuse," (B) have "no currently accepted medical use in treatment in the United States," and (C) for which "[t]here is a lack of accepted safety for use . . . under medical supervision," 21 U.S.C. 812(b)(1). Consequently, physicians may not ordinarily prescribe Schedule I controlled substances, 21 U.S.C. 829 (prescriptions for Schedule II, III, IV and V controlled substances), and manufacturing and distributing Schedule I controlled substances for research purposes is tightly regulated, 21 U.S.C. 822, 823. The Attorney General, acting with the benefit of the recommendations of the Secretary of Health and Human Services, is authorized to assign and reassign substances to the appropriate schedules, 21 U.S.C. 811. An abbreviated form of this report is available as CRS Report RS20998, *Marijuana for Medical Purposes: A Glimpse of the Supreme Court's Decision in United States v. Oakland Cannabis Buyers' Cooperative and Related Legal Issues*. Penalties authorized for CSA violations discussed in CRS Report 97-141, *Drug Smuggling, Drug Dealing and Drug Abuse: Background and Overview of the Sanctions Under the Federal Controlled Substances Act and Related Statutes*.

[2] Several other states have "medical marijuana" laws, ALASKA STAT. §11.71.090; ARIZ.REV.STAT.ANN. §13-3412.01(A); COLO.CONST. Art. XVIII §4; HAWAII REV.STAT. §§329-121 to 329-128; MD. CRIM.CODE ANN. §5-601; ME.REV.STAT.ANN. tit.22 §1102 or 2382-B(5); NEV.REV.STAT.ANN. §§453A.010 to 453A.400; ORE.REV.STAT. §§475.300 to 475.346; WASH.REV.CODE ANN. §§69.51A.005 to 69.51A.902.

[3] *E.g., United States v. Duclos*, 214 F.3d 27, 33 (1st Cir. 2000); *United States v. Unser*, 165 F.3d 755, 764 (10th Cir. 1999); *United States v. Milligan*, 17 F.3d 177, 181 (6th Cir. 1994).

as the claimed . . . necessity has lost its coercive force," *United States v. Bailey*, 444 U.S. 394, 415 (1980).

Supreme Court's Coop Decision

The Coop argued that necessity, as a common law defense, was an implicit exception to the CSA's prohibitions. No member of the Supreme Court agreed, 532 U.S. at 490.[4] In fact, a majority questioned the very existence of a federal necessity defense,[5] although as the concurring opinion points out, the case holds no more than that there is no necessity defense to the federal proscription on the cultivation or distribution of marijuana.[6]

On the basic point, the members of the Court were of one mind—Congress in the CSA addressed and rejected the very exception for which the Coop sought recognition. Congress outlawed manufacturing or distributing controlled substances except as authorized in the Act, 21 U.S.C. 841(a)(1). The only authorized exception for Schedule I controlled substances, such as marijuana, is government approved research, 21 U.S.C. 823(f); the Coop did not argue that it was engaged in government approved research; there is no other explicit exception for marijuana.

But the federal necessity defense is a creature of common law, frequently assumed if rarely cited by name, and Congress did not reject it by name. Yet Congress did limit Schedule I to those controlled substances with "no currently accepted medical use," 21 U.S.C. 812(b)(1)(B). It assigned marijuana to Schedule I, 21 U.S.C. 812(c). Thus, "[i]t is clear from the text of the Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception. The statute expressly contemplates that many drugs 'have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people,' §801(a), but it includes no exception at all for any medical use of marijuana. Unwilling to view this omission as an accident, and unable in any event to override a legislative determination manifest in a statute, [the Court] reject[ed] the Cooperative's argument," 532 U. S. at 493.

The clarity of Congress's rejection of a medical necessary defense doomed the Coop's invocation of the constitutional avoidance doctrine, a canon of statutory construction available only in cases of ambiguity, *Id*.[7] The Court declined to consider the constitutional issues which might have

[4] Justice Thomas wrote the opinion for the Court; Justice Stevens submitted a concurrence in which Justices Souter and Ginsburg joined; Justice Breyer took no part in consideration of the case.

[5] "As an initial matter we note that it is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute . . . . We need not decide, however, whether necessity can ever be a defense when the federal statute does not expressly provide for it. In this case, we need only recognize that a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act. The statute, to be sure, does not explicitly abrogate the defense. But its provisions leave no doubt that the defense is unavailable," 532 U.S. at 490-91.

[6] "Lest the Court's narrow holding be lost in its broad dicta, let me restate it here: '[W] e hold that medical necessity is not a defense to *manufacturing* and *distributing* marijuana' *Ante*, at 494 (emphasis added). . . . Apart from its limited holding, the Court takes two unwarranted and unfortunate excursions that prevent me from joining its opinion. First, the Court reaches beyond its holding . . . by suggesting that the defense of necessity is unavailable for anyone under the Controlled Substances Act. . . . [W]hether the defense might be available to a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering is a difficult issue that is not presented here.

"Second, the Court gratuitously casts doubt on 'whether necessity can ever be a defense' to *any* federal statute that does not explicitly provide for it, calling such a defense into question by a misleading reference to its existence as an 'open question.' By contrast our precedent has expressed no doubt about the viability of the common-law defense, even in the context of federal criminal statutes that do not provide for it in so many words. *See, e.g., United States v. Bailey*," 532 U.S. at 499-501 (Stevens, J., concurring in the judgement).

[7] Under constitutional avoidance, "where a statute is susceptible of two constructions, by one of which grave and

called for avoidance in the face of an ambiguity because the lower court had not raised them, 532 U.S. at 493.

Constitutional Issues

Although the Court set them aside, the Coop's brief presented commerce clause, enactment clause and due process clause issues.[8] The commerce clause, in conjunction with the enactment or necessary and proper clause, empowers Congress to enact legislation regulating interstate and foreign commerce.[9] Congress passed the Act, at least in part, as an exercise of its powers under the common clause.[10]

Raich & the Commerce Clause

The Court seems to have put the commerce clause question to rest in *Gonzales v. Raich*, 125 S.Ct. 2195 (2005). Congress's commerce clause powers are substantial but not unlimited. The Court summarized the scope of those powers in *Lopez* and *Morrison*, two instances where the commerce clause was found insufficient to support a claim of legislative authority. "First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress's commerce authority includes the power to regulate those activities having a

doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court will] adopt the latter," *Jones v. United States*, 526 U.S. 227, 239 (1999).

[8] Brief for Respondents at 37-49, United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483 (2001) (No. 00-151) (*Brief*).

[9] U.S.Const. Art.I, §8, cls.3, 18 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

[10] 21 U.S.C. 801("The Congress makes the following findings and declarations . . . (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because—(A) after manufacture, many controlled substances are transported in interstate commerce, (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession. (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances. (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate. (6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic. . ."). Other findings and declarations indicate Congress called upon its legislative powers to tax and spend for the general welfare of the United States, U.S.Const. Art.I, §8, cl.1, and to fulfill our obligations under treaties to which we are party, U.S.Const. Art.I, §8, cl.18; Art.II, §2, cl.2: The Congress makes the following findings and declarations: "(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people. (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people. . . . (7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances," 21 U.S.C. 801(1),(2),(7). The Single Convention obligates Parties to prohibit cultivation of marijuana in order to protect the public health and welfare and prevent the diversion into illicit channels, Art. 22, 18 U.S.T. 1408, 1419 (1961).

substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce," *United States v. Morrison*, 529 U.S. 598, 609 (2000), *quoting*, *United States v. Lopez*, 514 U.S. 549, 558-59 (1995)(internal citations omitted).

Recognizing that the boundaries of this last category of commerce clause power, intrastate activity with an interstate impact, are not always easily identified, *Morrison* and *Lopez* identified some of the signs which reveal that a regulated activity may in fact have no significant impact on interstate commerce. "First, we observed that §922(q) [the section at issue in *Lopez*] was a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise, however broadly one might define those terms," 529 U.S. at 610. "The second consideration that we found important . . . was that the statute contained no express jurisdictional element which might limit its reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce," 529 U.S. at 611-12. "Third, we noted that neither §922(q) nor its legislative history contains express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone," 529 U.S. at 612. "Finally, our decision in *Lopez* rested in part on the fact that the link between gun possession and a substantial effect on interstate commerce was attenuated," 529 U.S. at 612.

The Coop argued that "[o]nly the cultivation and distribution of cannabis in exchange for money or barter can be considered commerce, but even such commerce here is exclusively intrastate and therefore not within the power of Congress to regulate commerce among the states," *Brief* at 39.

Yet the Act, including its proscriptions on the cultivation, distribution and possession of marijuana, appears to be within the Congress's commerce clause powers as described in *Lopez* and *Morrison*. They identify as indicative of criminal statutes beyond the clause's reach those which purport to punish activities that have "nothing to do with commerce or any sort of economic enterprise." As the Coop's very name (Oakland Cannabis *Buyers'*) indicates, cultivation, distribution, or possession of marijuana almost always involves or is closely linked to some form of commercial activity—particularly if distribution requires the participation of physicians and health care insurers.

Moreover, while not necessarily dispositive by itself, Congress's findings with respect to the interstate impact of the distribution and possession of controlled substances (including marijuana) provide further evidence that the Act does not exceed the authority granted by the commerce clause. Until recently, the lower federal appellate courts when faced with challenges based on *Lopez* had unanimously concluded that the Act is within Congress's legislative authority under the commerce clause.[11]

[11] *E.g.*, *United States v. Edwards*, 98 F.3d 1364, 1369 (D.C.Cir. 1996); *United States v. Lerebours*, 87 F.3d 582, 584-85 (1st Cir. 1996); *Proyect v. United States*, 101 F.3d 11, 13 (2d Cir. 1996)("the cultivation of marijuana for personal consumption most likely does substantially affect interstate commerce. This is so because it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. As such, there is no doubt that Congress may properly have considered that marijuana consumed on the property where grown if wholly outside the scheme of regulation would have a substantial effect on interstate commerce"); *United States v. Orozco*, 98 F.3d 105, 106-107 (3d Cir. 1996); *United States v. Leshuk*, 65 F.3d 1105, 1111-112 (4th Cir. 1995)("Leshuk contends that the Drug Act is unconstitutional because it regulates intrastate drug activities, such as the marijuana manufacture in this case, which do not substantially affect interstate commerce . . . . We . . . reject Leshuk's Commerce Clause challenge to the constitutionality of the Drug Act"); *United States v. Dixon*, 132 F.3d 192, 202 (5th Cir. 1997); *United States v. Tucker*, 90 F.3d 1135, 1139-141 (6th Cir. 1996); *United States v. Westbrook*, 125 F.3d 996, 1008 (7th Cir. 1997); *United States v. Bell*, 90 F.3d 318, 321 (8th Cir. 1996); *United States v. Wacker*, 72 F.3d 1453, 1475 (10th Cir. 1995); *United States v. Jackson*, 111 F.3d 101, 101-102 (11th Cir. 1997). The Ninth Circuit had previously rejected a commerce clause challenge in a trafficking context, *United States v. Kim*, 94 F.3d 1247, 1249 (9th Cir. 1996); *see also*, *United States v. Rosenthal*, 266 F.Supp.2d 1068 (N.D.Cal. 2003)(decided before *Raich*, and rejecting a commerce clause challenge,

A divided panel in the Ninth Circuit, however, concluded that a party seeking to enjoin enforcement of the Act had shown her constitutional challenge was likely to succeed. That is, the court was convinced that "the application of the Act to the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law" likely exceeded Congress's authority under the commerce clause, *Raich v. Ashcroft*, 352 F.3d 1222, 1229 (9th Cir. 2003). The dissent argued that the issue was controlled by the Supreme Court's decision in *Wickard v. Filburn*, 317 U.S. 111 (1942),[12] 352 F.3d at 1235, a standard whose continued vitality the Supreme Court seemed to confirm when it cited *Wickard* approvingly in both *Lopez* and *Morrison*.[13] The majority, however, felt that "as the regulated activity in this case is not commercial, *Wickard*'s aggregation analysis is not applicable."[14] The Supreme Court in 6-3 decision written by Justice Stevens, agreed with the Ninth Circuit dissenter, *Gonzales v. Raich*, 125 S.Ct. 2195 (2005). Under the commerce and necessary and proper clauses, Congress may regulate so much of purely local conduct as it may rationally conclude is appropriate to its regulation of matters of interstate or foreign commerce.

"In *Wickard*," the Court concluded that "Congress had a rational basis for believing that, when viewed in the aggregate, leaving home-consumed wheat outside the regulatory scheme would have a substantial influence on price and market conditions," 125 S.Ct. at 2207. In much the same way the Court felt, "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions," 125 S.Ct. at 2207.

More specifically, the Court had "no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA" in light of "the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere" as well as "concerns about diversion into illicit channels," 125 S.Ct. at 2209. "Thus, as in *Wickard*, when it enacted comprehensive legislation to regulate the interstate market in a fungible commodity, Congress

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inter alia, by a marijuana farmer "authorized" by local officials to provide marijuana for medicinal purposes).

[12] "In *Wickard v. Filburn*, the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat. The *Wickard* Court explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, stating: 'Even if appellee's activity be local and through it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as direct or indirect.' The *Wickard* Court emphasized that although Filburn's own contribution to the demand for wheat may have been trivial by itself, that was not 'enough to remove him from the scope of federal regulation where, as here, his contribution taken together with that of many others similarly situated, is far from trivial,'" *United States v. Lopez*, 514 U.S. 549, 556 (1995)(internal citations omitted).

[13] "Reviewing our case law, we noted that 'we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce.' Although we cited only a few examples, including *Wickard v. Filburn*, we stated that the pattern of analysis is clear. 'Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.' . . . Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity. . . ." *United States v. Morrison*, 529 U.S. 598, 610 (2000), *quoting*, *United States v. Lopez*, 514 U.S. at 559, 560 (some internal citations omitted).

[14] It is difficult to discern how Filburn's growing wheat for his own consumption is different than the patient's growing marijuana for his own consumption. Triggered and dependent upon the endorsement of a physician (in an admirable but nonetheless commercial relationship) and involving an alternative to the commercial market in marijuana, the practices of medical users might be considered by some to have an impact on either the commerce that is the medical profession or that which is the marijuana market.

Implicit in the Ninth Circuit's terse assessment may be the belief that given the opportunity the Supreme Court will decide that *Wickard* lies not just within, but just beyond, the reach of Congress's commerce clause power. Not so.

was acting well within its authority to 'make Laws which shall be necessary and proper' to 'regulate Commerce . . . among the several States.' U.S.Const. Art. I, §8. That the regulation ensnares some purely intrastate activity is of no moment," 125 S.Ct. at 2209.

Even if Congress had lacked the legislative authority to ban cultivation, distribution and possession of marijuana under the commerce clause, its legislative authority to implement our various treaty obligations for the suppression of illicit controlled substances would probably be sufficient.[15]

Enactment Clause

When Congress enjoys legislative subject matter jurisdiction, such as the power to regulate interstate and foreign commerce, it may nevertheless elect to pass laws which exceed what is constitutionally "proper" under the implementary necessary and proper or enacting clause. For instance, legislation is not "proper for carrying into execution" constitutionally vested powers, such as those under the commerce clauses, when it seeks to "compel the states to enact or enforce a federal regulatory program" or to when it issues "directives requiring the states to address particular problems, [or] command[s] the states' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program," *Printz v. United States*, 521 U.S. 898, 924, 934 (1997), *citing, New York v. United States*, 505 U.S. 144 (1992).

The Coop argued that Congress is not acting in the necessary and proper exercise of its legislative authority when it acts in total derogation of rights which the people of a given state have identified as fundamental unenumerated constitutional rights, *Brief* at 45-9.[16]

The contention may have helped spur the three concurring members of the Court to urge at least a rule of construction that would recognize a medical necessity defense for marijuana possession.[17] The majority's sweeping dicta and the accompanying footnote which sparked Justice Stevens'

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[15] Perhaps because the courts have rarely found it necessary to look beyond the commerce clause, the case law on alternative sources of legislative authority is sparse, but it does include *United States v. Rodriquez-Camacho*, 468 F.2d 1220, 1222 (9th Cir. 1972) ("Furthermore, the United States is a party to the Single Convention on Narcotic Drugs binding, *inter alia*, all signatories to control persons and enterprises engaged in the manufacture, trade and distribution of specified drugs. Marijuana (cannabis) is so specified. Enactment of sec. 841(a)(1) is a permissible method by which Congress may effectuate the American obligation under the treaty").

[16] "This case represents an intersection of the Tenth and Ninth Amendments. The people have used the initiative power reserved to themselves under the Tenth Amendment to recognize a fundmental (sic) liberty interest they have retained under the Ninth Amendment. By an unwarranted extension of its powers under the Necessary and Proper Clause, the federal government now seeks to interfere with both the exercise of the power reserved by the people and the States and the rights retained by the people," *Brief* at 48-9.
The Ninth and Tenth Amendments declare, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," U.S.Const. Amend. IX; and "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," U.S.Const. Amend. X.

[17] "The overbroad language of the Court's opinion is especially unfortunate given the importance of sowing respect for the sovereign States that comprise our Federal Union. That respect imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of the State have chosen to serve as a laboratory in the trial of novel, social, and economic experiments. . . . By passing Proposition 215, California voters have decided that seriously ill patients and their primary caregivers should be exempt from prosecution under state laws for cultivating and possessing marijuana if the patent's physician recommends using the drug for treatment. This case does not call upon the Court to deprive *all* such patients of the benefit of the necessity defense to federal prosecution, when the case itself does not involve *any* such patients," 532 U.S. at 502 (Stevens, J. concurring in the judgment)(emphasis in the original).

comments, however, may reflect the fact that at least five members of the Court found the "necessary and proper" argument unpersuasive.[18]

Due Process Clause

Of course, the Coop's Ninth Amendment fundamental-unenumerated-rights argument is closely akin to its substantive due process contentions, i.e., that "these patients have a fundamental right to be free from government interdiction of their personal self-funded medical decision, in consultation with their physician, to alleviate their suffering through the only alternative available to them," *Brief* at 42-3.

The due process clause "provides heightened protection against government interference with certain fundamental rights and liberty interests. . . .[I]n addition to the specific freedoms protected by the Bill of Rights, the liberty specially protected by the due process clause includes the rights . . . to bodily integrity and to abortion . . . [and in all likelihood] to refuse unwanted lifesaving medical treatment," *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). The Court, however, has been reluctant to expand the concept of substantive due process, 521 U.S. at 720, and has specifically refused to consider physician assisted suicide among the fundamental liberties so protected, 521 U.S. at 728.

Glucksberg seems to pose a major obstacle to recognition of a right to use marijuana for medicinal purposes, for it appears to have refused to acknowledge the right which the Coop claims. The Coop claims patients have "a fundamental right to be free from government interdiction of their personal self-funded medical decision, in consultation with their physician, to alleviate their suffering," *Brief* at 43. *Glucksberg* found that terminally ill patients facing the prospect of a painful death have no due process right to the assistance of their physicians to secure and assist in the administration of painless but fatal substances to alleviate their suffering.

Beyond this, the *Glucksberg* expansion tests are not particularly helpful. They require that those rights within the ambit of due process protection consist of "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of order liberty, such that neither liberty nor justice would exist if they were sacrificed," 521 U.S. at 720-21. The history of the Coop's asserted right is arguable exactly the opposite. It is a history replete with government regulation of the practice of medicine, of the distribution and use of medicinal products, of controlled substances, and of marijuana in particular.

Federal regulation of marijuana as a crime control measure dates back from the Marihuana Tax Act of 1937, 50 Stat. 551 (1937) by which time every state in the Union already regulated its sale.[19] The Act was modeled after the more general Harrison Narcotics Act of 1914 under which

[18] "Lest there be any confusion, we clarify that nothing in our analysis, or the statute, suggests that a distinction should be drawn between the prohibitions on manufacturing and distribution and the other prohibitions in the Controlled Substances Act [such as the prohibition on possession]. Furthermore, the very point of our holding is that there is no medical necessity exception to the prohibitions at issue, even when the patient is seriously ill and lacks alternative avenues for relief. Indeed, it is the Cooperative's argument that its patients are seriously ill, and lacking alternatives. We reject the argument that these factors warrant a medical necessity exception. . . . Finally, we share Justice Stevens' concern for showing respect for the sovereign states that comprise our federal union. However, we are construing an Act of Congress, not drafting it. Because federal courts interpret, rather than author, the federal criminal code, we are not at liberty to rewrite it. Nor are we passing today on a constitutional question, such as whether the Controlled Substances Act exceeds Congress's power under the commerce clause," 532 U.S. at 494-94 n.7.

[19] Taxation of Marihuana: Hearing Before a Subcomm. of the Senate Comm. on Finance, 75th Cong., 1st Sess. 9-10 (1937)(testimony and chart accompanying the testimony of Clinton M. Hester, Assistant General Counsel, Department of the Treasury).

opium and other narcotics were regulated.[20] Congress passed the earlier Food and Drug Act of 1906 "to prevent the manufacture, sale or transportation of adulterated, misbranded or poisonous, or deleterious foods, drugs, medicines, or drugs and for regulating the traffic therein," 34 Stat. 768 (1906). In more general terms, "the practice of medicine . . . has a long history of being regulated to protect the public safety."[21]

Glucksberg's dicta seems to further undermine any contention that due process substantially restricts the federal government's authority to refuse to legalize marijuana for medical use. There, the Court cited *United States v. Rutherford*, 442 U.S. 544, 558 (1979), for the observation that "Congress could reasonably [determine] to protect the terminally ill, no less than other patients, from the vast range of self-styled panaceas that inventive minds can devise."[22] Here, Congress appears to have done just that. It has concluded that marijuana is highly addictive and has no accepted medical use, but permits reclassification of marijuana and its subsequent use when and if its medicinal benefits can be demonstrated under the procedures of the Controlled Substances Act.[23]

Free Speech

Although the issue was not raised in *Oakland Cannabis Buyers' Cooperative*, the lower federal courts initially appeared divided over whether the First Amendment right to free speech shields physicians who prescribe or otherwise recommend marijuana to their patients. A court in the Northern District of California granted a preliminary injunction enjoining federal authorities from prosecuting physicians for such conduct. The order also prohibited federal authorities from revoking the physicians registration to prescribe controlled substances[24] and from excluding them from Medicare/Medicaid participation[25] for such conduct, *Conant v. McCaffrey*, 172 F.R.D. 681, 701 (N.D.Cal. 1997). The court subsequently made the injunction permanent in an unpublished opinion, 2000 WL 1281175 (C97-001139 WHA)(N.D.Cal. Sept.7, 2000). It found serious

[20] H.Rept. 75-792, at 2 (1937); S.Rept. 75-900, at 3 (1937).

[21] *Pearson v. McCaffrey*, 139 F.Supp.2d 113, 121 (D.C.Cir. 2001), quoting the observation from *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977) that, "It is, of course, well-settled that the State has broad police powers in regulating the administration of drugs by health professionals."

[22] *Rutherford* involved a patients' suit seeking to enjoin enforcement by the Food and Drug Administration (FDA) of restrictions on the use of Laetrile by terminally ill cancer patients. The court of appeals had affirmed the district court's injunction which directed the FDA to permit terminally ill cancer patients to use Laetrile, *Rutherford v. United States*, 582 F.2d 1234, 1237 (1978), concluding that the Federal Food, Drug and Cosmetic Act, which required FDA approval of the safety and efficacy of new drugs, had no application to drugs intended for use by the terminally ill. The Supreme Court reversed. It could see nothing in the Food Act or its legislative history stating or implying that its provisions were limited to the drugs intended for use by the curably ill or that the drugs intended for the treatment of the incurably ill were exempted from the its demands. 442 U.S. at 552-57.

[23] As in *Oakland Cannabis Buyers' Cooperative*, the Court in *Raich* did not reach the substantive due process issue: "Respondents also raise a substantive due process claim and seek to avail themselves of the medical necessity defense. These theories of relief were set forth in their complaint but were not reached by the Court of Appeals. We therefore do not address the question whether judicial relief is available to respondents on these alternative bases," 125 S.Ct. at 2215.

[24] In order to prescribe controlled substances, physicians must be registered with the Attorney General and their registration (DEA registration number) may be revoked on the basis of conduct "inconsistent with the public interest," 21 U.S.C. 824(a)(4). Federal authorities had indicated that they would consider providing, recommending, or prescribing marijuana conduct inconsistent with the public interest, 172 F.R.D. at 698.

[25] Individuals or entities may be excluded from participation based on "professional competence, professional performance, or financial integrity," 42 U.S.C. 1320a-7(b)(5). Federal authorities had likewise indicated that they would consider providing, recommending, or prescribing marijuana conduct sufficient for exclusion, 172 F.R.D. at 698.

questions as to whether the federal enforcement policy permitted a content-based restriction on speech and whether it was unconstitutionally vague, 172 F.R.D. at 694-98.

A court in the District of Columbia, on the other hand, refused to issue a similar injunction, *Pearson v. McCaffrey*, 139 F.Supp.2d 113, 125 (D.D.C. 2001). From the court's perspective, "there are no First Amendment protections for speech that is used as an integral part of conduct in violation of a valid criminal statute," 139 F.Supp.2d at 121. Therefore, "[e]ven though state law may allow for the prescription or recommendation of medicinal marijuana within its borders, to do so is still a violation of federal law. . . . The fact that speech or writing is the mechanism used by physicians to carry out such a task does not make the conduct less violative of federal law. The First Amendment does not prohibit the federal government from taking action against physicians whose prescription or recommendation of medicinal marijuana violates the [Act]," *Id*.

The Court of Appeals for the Ninth Circuit muted any suggestion of a conflict in its narrowly couched approval of the district court's opinion, *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). Federal authorities are enjoined from punishing doctors simply because the doctors have recommended the use of marijuana to their patients. Patients might lawfully use the information to support a petition to Congress for a change in federal law or admission into a federally approved rehabilitation program, 309 F.3d at 634. On the other hand, "[i]f, in making the recommendation, the physician intends for the patient to use it as the means for obtaining marijuana, as a prescription is used as a means for a patient to obtain a controlled substance, then a physician would be guilty of aiding and abetting the violation of federal law" and could be punished, 309 F.3d at 635.

Related Legislative Activity

State medical marijuana initiatives have provoked a mixed response in Congress including proposals to:

- require the Attorney General to revoke the controlled substance registration of any practitioner who recommended marijuana for medical purposes;[26]
- bar those who recommend marijuana for medical purposes from participating in Medicare and state health care programs;[27]
- clarify and increase the penalties applicable to Controlled Substance Act violations by registrants;[28]
- make mandatory, in those states with a medical marijuana exception, the discretionary denial of federal benefits for those convicted of controlled substance offenses;[29]
- make it clear that Controlled Substance Act provisions continue to apply notwithstanding the massage of state medical marijuana laws;[30]

[26] H.R. 1310 (105th Cong.)(Rep.Solomon); S. 40 (105th Cong.)(Sen.Faircloth).

[27] S. 40 (105th Cong.)(Sen.Faircloth).

[28] S. 40 (105th Cong.)(Sen.Faircloth).

[29] H.R. 1265 (105th Cong.)(Rep.Solomon).

[30] H.R. 3184 (105th Cong.)(Rep.Riggs).

- provide that the Controlled Substance Act shall supersede any state law with which it differs;[31]
- study the impact of the California and Arizona medical marijuana initiatives;[32]
- create a federal medical marijuana exception to the Controlled Substances Act and the Federal Food, Drug and Cosmetic Act in the states with medical marijuana laws;[33]
- prohibit use of funds appropriated for the District of Columbia to conduct any ballot initiative to legalize or reduce the penalties for violations involving Schedule I controlled substances;[34]
- prohibit use of funds appropriated for the District of Columbia to enact or implement any law to legalize or reduce the penalties for violations involving Schedule I controlled substances (and prohibiting the D.C. medical marijuana referendum from taking effect); and[35]
- prohibit the recipients of transit grants from promoting the legalization or medical use of schedule I controlled substances, like marijuana.[36]

In the 107th Congress, Congressman Frank renewed his proposal for federal compatibility with state medical marijuana laws under which neither the Act nor the Federal Food, Drug and Cosmetic Act would bar possession, prescription, dispensing or cultivating marijuana for medical purposes in those jurisdictions whose states laws permitted it.[37]

In the 108th Congress, Congressman Frank offered H.R. 2233 which took much the same approach. It provided that neither the Controlled Substances Act nor the Federal Food, Drug and Cosmetic Act should be construed to outlaw the prescription, use, dispensing, or cultivation of marijuana for medicinal purposes, and it reclassifies marijuana as a schedule II controlled substance. Thus, as a matter of federal law marijuana would become available for medical use under stringent controls, but it would remain unavailable as a matter of state law except in those jurisdictions whose legislation contains a medical marijuana exemption or defense. H.R. 2233 leaves unaffected federal, state and local smoking regulations or prohibitions.

Congressman Farr introduced a proposal of comparable effect, H.R. 1717 (108th Cong.). It would have amended the Controlled Substance Act to provide a medical marijuana defense (based on

[31] H.R. 4802 (106th Cong.)(Rep.Souter).

[32] S. 15 (105th Cong.)(Sen.Daschle); S. 2484 (105th Cong.)(Sen.Leahy); S. 9 (106th Cong.) (Sen.Daschle).

[33] H.R. 1782 (105th Cong.)(Rep.Frank); H.R. 912 (106th Cong.)(Rep.Frank).

[34] P.L. 105-277, 112 Stat. 2681-150 (1998); *Turner v. District of Columbia Bd. of Elections and Ethics*, 77 F.Supp.2d 25 (D.D.C. 1999) held that the provision did not bar the Board from counting, releasing, or certifying the results of the D.C. medical marijuana referendum.

[35] P.L. 106-113, 113 Stat. 1530 (1999); P.L. 106-553, 114 Stat. 2762A-34 (2000); P.L. 107-76, 115 Stat. 923 (2001); P.L. 108-7, 117 Stat. 126 (2003); P.L. 108-199, 118 Stat. 139. *Marijuana Policy Project v. District of Columbia Bd. of Elections and Ethics*, 191 F.Supp.2d 196, 199 (D.D.C. Mar. 28, 2002) held that the provision regulated core political activity on the basis of content and thus its application to the plaintiffs was barred by the First Amendment. The decision was reversed on appeal; the Barr Amendment does not unconstitutionally restrict the free speech rights of medical marijuana advocates, *Marijuana Policy Project v. United States*, 304 F.3d 82, 83 (D.C.Cir. 2002).

[36] P.L. 108-199, 118 Stat. 311 (2004).

[37] H.R. 1344 (107th Cong.)(also (a) instructing the National Institute of Drug Abuse to make marijuana available for an investigative new drug study, and (b) indicating the proposal is not intended to supersede laws which regulate smoking in public); H.R. 2592 (107th Cong.) (also indicating the proposal is not intended to supersede laws which regulate smoking in public).

state law) for use in prosecutions or proceedings under the Act and to ensure the prompt return of medical marijuana when the defense is successfully claimed.

The Barr Amendment appeared in both the House-passed and the Senate-reported versions of the District of Columbia appropriations bill for FY2004, H.R. 2765 (§123); S. 1583 (§126).

Congressman Frank has re-introduced his earlier proposals as H.R. 2087 in the 109th Congress.

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